

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
LARRY D. VAUGHT, JUDGE

DIVISION II

CACR06-994

May 9, 2007

MARK FISHER

APPELLANT

APPEAL FROM THE MILLER
COUNTY CIRCUIT COURT
[CR-2005-131-1]

V.

HON. JOE EDWARD GRIFFIN,
CIRCUIT JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED

Appellant Mark Fisher was convicted in Miller County Circuit Court of robbery and burglary as an accomplice to the theft of a video device and an X-box game system. He was sentenced to fifty years' imprisonment. On appeal, Fisher argues that there was insufficient evidence to support his conviction; that the trial court erred by refusing to grant a continuance of the trial; that the court improperly allowed certain evidence at trial; and that the court erroneously allowed a police officer to present hearsay testimony. We affirm.

The evidence showed that on January 15, 2005, Fisher lured a homeowner, Rosie Richie, out of her house on the pretext of being a gas-company employee. He knocked on Richie's door, and when she answered he stated that he worked for the gas company and that he needed to check her back yard. She walked around the back of the house with Fisher, and he asked her several questions as he paced back and forth in her yard. Richie testified that

Fisher's erratic behavior made her suspect that something was wrong. Fisher then inquired as to exactly where Richie's gas meter was located—at this point, she asked him to leave.

According to her testimony, when Richie turned around, Fisher was gone; but she noticed another man exiting her home with her son's X-box gaming system in hand. Richie approached the thief and started pulling at his sweater attempting to make him drop the game system. As she continued to struggle with the man, she noticed that he also had one of her purses. He then threw the items in the truck and, while she tried to stop him from leaving, he "pushed [her] kind of hard so [she] fell back and [she] fell on [her] bottom."

The following day, Richie was shown a photographic lineup, and she circled Fisher's photograph as the man who posed as the "gas man." She described Fisher as the smaller of the two culprits. She also noted that he appeared to be a "gypsy."

Dorothy Conley, Richie's neighbor, testified that on the same day Richie was robbed, an individual came to her home wanting to check her gas meter. She said that because he was not in uniform and arrived late in the day she was suspicious and refused his request. She described the person who she saw as a gypsy, which according to Conley "you can tell by the coloring of the skin." Conley further testified that on January 16, 2007, a detective came to her home and she identified Fisher as the man who pretended to be from the gas company.

Paul Boswell, Fisher's co-defendant, testified that Fisher was not with him on January 15, 2005, and that he was the sole actor in the burglary. Boswell testified that, although he had previously made a statement under oath implicating Fisher, he did so only to get a more lenient sentence and that his attorney "coached" him to testify against Fisher. At trial, Boswell

admitted that in his previous sworn statement he told the detective that it was Fisher who knocked on the door and lured Richie out of her house. Boswell further testified that his prior incrimination had been fabricated and that his actual accomplice was “another gypsy guy,” whom he refused to identify by name. He also claimed that because his deal “didn’t get cut,” he was now testifying truthfully.

Detective Ed Chattaway with the Texarkana Police Department testified that Boswell and Fisher were developed as suspects, and after witnesses identified them in a photo line-up the police were able to secure a warrant to search a mobile home where Fisher lived. According to Chattaway, once inside, the officers noticed an X-box console on the floor and found Fisher and Boswell inside a back bedroom closet. Chattaway also testified that Boswell, in an interview on January 19, 2005, implicated Fisher as his cohort.

Fisher first claims that the trial court’s failure to grant his motion for directed verdict is reversible error because there was “insufficient evidence to show it was [Fisher] that participated in the burglary.” It is well settled that a motion for a directed verdict is a challenge to the sufficiency of the evidence. *Atkinson v. State*, 347 Ark. 336, 64 S.W.3d 259 (2002). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Id.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Id.* When a defendant challenges the sufficiency of the evidence convicting him, the evidence is viewed in the light most favorable to the State. *Id.* Only evidence supporting the verdict will be considered. *Id.*

Fisher's criminal liability is based upon his status as an accomplice. In cases such as the instant one, where the theory of accomplice liability is implicated, a sufficiency of the evidence challenge is affirmed if substantial evidence exists that the defendant acted as an accomplice in the commission of the alleged offense. *Cook v. State*, 350 Ark. 398, 86 S.W.3d 916 (2002). A person is criminally liable for the conduct of another person when he is the accomplice of another person in the commission of an offense. Ark. Code Ann. § 5-2-402 (Repl. 1997). Under Arkansas Code Annotated section 5-2-403 (Repl. 1997), an accomplice is defined as follows:

(a) A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, he:

(1) Solicits, advises, encourages, or coerces the other person to commit it; or

(2) Aids, agrees to aid, or attempts to aid the other person in planning or committing it; or

(3) Having a legal duty to prevent the commission of the offense, fails to make proper effort to do so.

(b) When causing a particular result is an element of an offense, a person is an accomplice in the commission of that offense if, acting with respect to that result with the kind of culpability sufficient for the commission of the offense he:

(1) Solicits, advises, encourages, or coerces the other person to engage in the conduct causing the result; or

(2) Aids, agrees to aid, or attempts to aid the other person in planning or engaging in the conduct causing the result; or

(3) Having a legal duty to prevent the conduct causing the result, fails to make proper effort to do so.

The determination of the status as an accomplice is ordinarily a mixed question of law and fact. *Cook*, 350 Ark. at 409, 86 S.W.3d at 923. When two persons assist one another in the commission of a crime, each is an accomplice and criminally liable for the conduct of both. *Id.* A participant cannot disclaim responsibility because he did not personally take part in every act that went to make up the crime as a whole. *Id.*

In this case, although Fisher was not the person who pushed Richie to the ground or stole the game system, he was an accomplice to Boswell; therefore, he cannot disclaim his responsibility simply because he did not take part in every act of the robbery and residential burglary. *Id.* Fisher lured Richie out of her house so Boswell could enter the residence and steal items. Although Fisher may not have anticipated that Boswell would physically harm Richie, Fisher is liable nonetheless because each accomplice is criminally liable for the conduct of both. *Id.* Further, viewing the evidence in the light most favorable to the State, it is clear that there was sufficient evidence—two identifications and a statement from the co-defendant—that Fisher rendered Boswell aid that enabled him to commit the crimes. Therefore, the trial court properly denied Fisher’s directed-verdict motion.

Next, Fisher argues that the trial court erred in its decision not to allow a continuance. Fisher had requested the continuance to obtain a receipt from a motel in Missouri. He claimed to have only learned of this evidence two days before the trial began and that the receipt would prove that he was not in Texarkana on January 15, 2005. The court denied the motion for continuance, stating that the timing of this information was “very questionable since [Fisher] has had knowledge of this for a year and a half and could have presented this

alibi, if nothing else, on the day he was arrested, and just two days before trial, after the jury has been selected, is the first time this is brought forward.”

When deciding whether a continuance should be granted, the following factors are to be considered by the trial court: 1) the diligence of the movant; 2) the probable effect of the testimony at trial; 3) the likelihood of procuring the witness in the event of a postponement; 4) the filing of an affidavit, stating not only what facts the witness would prove but also that the appellant believes them to be true. *See Green v. State*, 354 Ark. 210, 214, 118 S.W.3d 563, 566 (2003). However, the lack of diligence alone is sufficient cause to deny a continuance. *Id.* Certainly Fisher lacked diligence by seeking a continuance on the date of trial when the “alibi” witness and evidence had been known to him since the day of his arrest—more than one year prior to trial. Moreover, Fisher’s case was continued three times before and this potential alibi evidence was never mentioned. *See Turner v. State*, 326 Ark. 115, 120, 931 S.W.2d 86, 89 (1996) (holding that defendant failed to act diligently by seeking *another* continuance on the day of trial). Therefore, because Fisher failed to act diligently in his attempt to secure this alibi evidence, the trial court did not abuse its discretion in its decision to deny Fisher’s request for a fourth continuance.

For his third point of reversal, Fisher argues that the trial court allowed an improperly suggestive line-up into evidence. Fisher argues that the photo line-up was unduly suggestive because he was the “only gypsy in the lineup, or at least one of only two who fit a description of the offender,” and Richie’s in-court identification should not have been allowed. While Fisher objected to the actual photo line-up, he did not object to Richie’s in-court

identification. In *Edwards v. State*, our supreme court noted that when a defendant objects to the admissibility of the photo line-up but fails to object to the in-court identification, any alleged error relating to the introduction of the line-up will not be considered on appeal. 360 Ark. 413, 201 S.W.3d 909 (2005). Accordingly, because Fisher failed to object to Richie's in-court identification at trial, this issue is not preserved for our review. However, even if we did reach the merits, the trial court's decision that the motion was untimely was correct. Fisher did not object until the day before trial, and Arkansas Rule of Criminal Procedure 16.2(b) requires that a motion to suppress be filed no later than ten days before the trial date.

Finally, we consider Fisher's argument that one of the law-enforcement officer's testimony (recalling statements that Richie made relating to the crime) was hearsay and violated his right to confrontation. The trial court overruled Fisher's objection and ruled that the hearsay was admissible under the excited-utterance exception. However, on appeal Fisher's argument for reversal is limited to a claim that his right to confront the witness was abridged. According to the Supreme Court of the United States, when "the declarant appears for cross-examination at the trial, the Confrontation Clause places no constraints at all on the use of [her] prior testimonial statements" because the Confrontation Clause does not preclude admission of a statement when the declarant is present at trial to defend or explain it. See *Crawford v. Washington*, 541 U.S. 36, 59 (2004). Therefore, because the actual declarant—Richie—was present at trial, there was no Confrontation Clause violation, and the trial court is affirmed on this point.

Affirmed.

MARSHALL and HEFFLEY, JJ., agree.

